Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

MILOS SOVAK, M.D., AND BIOPHYSICA, INC.,
Petitioners,

v.

COOK IMAGING CORP. AND CHUGAI PHARMACEUTICAL CO.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals improperly disregarded this Court's recent teachings that federal courts are to enforce parties' arbitration agreements in accordance with state law where the parties contracted for state (and not federal) law to be applied to all matters associated with the arbitration?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners, plaintiffs-appellants below, are Milos Sovak, M.D., and Biophysica, Inc. Biophysica, Inc. has no parent company, and no publicly held company owns 10% or more of its stock. Respondents, defendants-appellees below, are Cook Imaging Corp. and Chugai Pharmaceutical Co.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING PETITION	7
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page(s)

Atkins v. Rustic Woods Partners, 171 Ill. App. 3d 373, 525 N.E.2d 551 (1988) 10
EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002) 6, 13
Garver v. Ferguson, 76 Ill. 2d 1, 389 N.E.2d 1181 (1979) 11
Lawrence v. Chater, 516 U.S. 163 (1996) (*per curiam*) 13
Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (*per curiam*) 12
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 5, 9, 10, 13
Shearson Lehman Bros., Inc. v. Hedrich, 266 Ill. App. 3d 24, 639 N.E.2d 228 (1994) 11
Sheet Metal Workers Int'l Ass'n, Local 359 v. Ariz. Mech. & Stainless, Inc., 863 F.2d 647 (9th Cir. 1988) 10
Stutson v. United States, 516 U.S. 193 (1996) (*per curiam*) 13
United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 10
Volt Information Sciences, Inc. v. Stanford University, 489 U.S. 468 (1989) 5, 8-9, 13

STATUTES AND RULES

9 U.S.C. § 4 ..... 2, 7, 12
Sup. Ct. R. 10(a) 13
Sup. Ct. R. 10(c) 12

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Milos Sovak, M.D., and Biophysica, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") 1a-8a & 33a-34a, is reported at 280 F.3d 1266 (9th Cir. 2002). The opinions of the district court, Pet. App. 9a-19a & 21a-32a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2002. Pet. App. 1a, 35a. A timely petition for rehearing was denied on April 10, 2002. Pet. App. 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

As decided by the court of appeals, this case implicates the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Section 4 of the FAA provides in part that any arbitration hearing and proceedings ordered by a federal court pursuant to an arbitration agreement between the parties "shall be within the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4. This petition for certiorari, however, does not require this Court to construe this or any other provision of the FAA, as petitioner's essential argument is that the parties had contracted for application of *Illinois* rules on arbitration, as permitted and respected by decisions of this Court.

STATEMENT

This case presents the question of whether the Ninth Circuit failed to apply recent decisions of this Court. These decisions establish that parties to an arbitration agreement are free to contract for the application of *state* law on all aspects of arbitration (as set forth, for example, in the Uniform Arbitration Act adopted by many states) and that federal policy requires that federal courts uphold and enforce such a contract. This Court has the opportunity, by summarily reversing, not only to eliminate the manifest prejudice and unfairness that the Ninth Circuit's failure has caused petitioner but, more broadly, to underscore the Court's recent teachings that federal policy requires federal courts not to apply the FAA's rules of arbitration in all instances, but rather to enforce parties' particular arbitration agreements.

To place this issue in context, it is necessary to describe (1) the proceedings in the district court and the arbitration, (2) the decision of the court of appeals, and (3) the court of appeals' action on petitioner's request for rehearing.

1. Proceedings in the District Court and the Arbitration. This action has its origins in a contract formed

in 1987, when petitioner[1] was chairman of the board of respondent Cook Imaging Corporation ("Cook"). The 1987 contract obligated respondent Chugai Pharmaceutical Corporation ("Chugai"), a Japanese company, to assist in obtaining regulatory approval in Japan of an x-ray enhancing drug (Ioxilan) that petitioner had invented. In 1991, when petitioner stepped down as chairman of Cook, petitioner and Cook entered into an agreement ("the 1991 agreement") under which, in exchange for the transfer of certain rights from petitioner to Cook, Cook agreed to pay petitioner 33 percent of any royalties under the 1987 contract with Chugai.

When various contractual dealings between respondents and between respondent Cook and another company resulted in Cook's receiving no revenues from Chugai under the 1987 contract (and thus in petitioner's receiving none, even though Cook received large revenues from a subsequent contract with another Japanese company), petitioner commenced this action against Chugai for breach of contract. After Chugai had removed the case to federal district court in California and petitioner's initial claims had been dismissed, petitioner filed a second amended complaint in the same action, asserting conversion claims against Cook. Cook successfully moved to dismiss this second amended complaint for failure to state a claim.

Petitioner thereupon filed a third amended complaint alleging, among other things, that Cook had breached the 1991 agreement with petitioner. Relying on a provision in the 1991 agreement, Cook moved, on July 11, 1997, to dismiss the complaint in favor of arbitration. Petitioner responded that Cook had waived the right to compel arbitration by having previously moved to dismiss the second amended complaint for failure to state a claim.

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[1] This brief will use the term "petitioner" simply to refer to Dr. Sovak, although technically his company, Biophysica, Inc., is a petitioner as well.

It is important to describe the premise of the parties' arguments on this point: they all agreed that Illinois law governed the question of arbitrability. For example, respondent Cook noted that the 1991 agreement provides that "'*[t]his Agreement shall be construed and interpreted in accordance with the laws of the State of Illinois.*'" CA9 ER 92 (Cook District Court Memorandum) (emphasis added by Cook). Respondent Cook thereupon stated that, "[t]herefore, the arbitration provision is to be construed and interpreted under Illinois law." CA9 ER 93. Cook even specifically explained, in a footnote to this last quotation, that this contractual provision meant that the Federal Arbitration Act ("FAA") did not apply. *Id.* n.13. Petitioner similarly agreed that Illinois law governed arbitrability questions. The focus of the parties' *dis*agreement concerned the content of Illinois law: *viz.*, whether Illinois law provided that Cook had waived its right to compel arbitration by having previously moved to dismiss the second amended complaint for failure to state a claim, *see supra* p. 3.

The district court ruled in favor of Cook on September 16, 1997, applying Illinois arbitration law (as set forth in the Uniform Arbitration Act adopted by that state) and compelling arbitration (in Chicago, as provided in the 1991 agreement). Pet. App. 26a-31a & n.3. When the arbitration panel ruled in favor of Cook without even affording petitioner an evidentiary hearing, petitioner moved to set aside the arbitration award in the district court, which had retained jurisdiction.

The district court denied the motion on January 11, 2000. Pet. App. 9a-19a. For the first time, the district court applied *federal* law to the 1991 agreement. Specifically, it now concluded that the Federal Arbitration Act—and not the Illinois Arbitration Act—provided the governing standard for petitioner's challenge to the validity of the arbitration award. Pet. App. 12a. The district court gave no explanation why it reached that conclusion.

2. Proceedings in the Court of Appeals. Petitioner appealed to the Ninth Circuit. Among his assignments of error were (1) the district court's conclusion in 1997 that Cook had not waived its right to compel arbitration by moving to dismiss the second amended complaint for failure to state a claim and (2) the district court's conclusion in 2000 that federal law provided the standard under which petitioner's motion to vacate the arbitration award should be evaluated. The Ninth Circuit affirmed the refusal to vacate the arbitration award.

First, the court of appeals concluded that federal law governed the matters critical here. Thus, it held that the district court erred when it concluded in 1997 that it was the Uniform Arbitration Act as enacted in Illinois that required arbitration, for the court of appeals ruled instead that the *FAA* required the arbitration.

In explaining its reasoning, the court acknowledged that "[p]arties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act," Pet. App. 4a (citing *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 479 (1989)), so long as the parties "clearly evidence their intent to be bound by such rules" and thus to displace the FAA. *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995)). The court concluded that the provision in the 1991 agreement for the application of Illinois law was insufficiently clear evidence, for it viewed the provision as "a general choice-of-law clause within an arbitration provision" which "simply suppl[ies] state substantive, decisional law, and not state law rules for arbitration." *Id.* at 5a. Because "waiver of the right to compel arbitration is a rule for arbitration," the court reasoned, "the FAA, and not Illinois law, supplies the standard for waiver." *Id.*

Having ruled that federal law applied, the court of appeals next rejected petitioner's argument that Cook had waived its

right to compel arbitration on the third amended complaint by moving to dismiss the second amended complaint. The court observed that petitioner "has not shown how he was prejudiced by Cook's delay in moving to compel arbitration," as required by existing federal law in the Ninth Circuit. Pet. App. 6a-7a. On its view of the case (i.e., that federal law controlled), the court was not required to address petitioner's argument that under the different standard for waiver provided by *Illinois* law (which does not require a showing of prejudice) Cook had clearly waived its right to compel arbitration. *See, e.g.*, Petitioner's CA9 Brief at 10-12.[2]

3. Proceedings on Rehearing. Petitioner sought rehearing. He suggested that the panel had failed to apply established rules of interpretation in considering the effect of the provision for Illinois law in the 1991 agreement. Petitioner argued that under *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002)—decided after the parties had briefed and argued the appeal—the panel should have given effect to the parties' agreement to apply Illinois law, even with respect to the matters concerning the rules for arbitration.

After amending one aspect of its opinion, the court denied rehearing. The amendment merits description because it encapsulates the unfair vise in which petitioner was caught by the district court's applying Illinois law on arbitration in the 1997 pre-arbitration proceedings (as urged by both parties) and the Ninth Circuit's applying federal law on the same matters.

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[2] The court of appeals proceeded to uphold the district court's order denying petitioner's motion to vacate the arbitration award. It rejected petitioner's contention that it was entitled to vacatur on the grounds that there were errors of law appearing on the face of the arbitration award; the court of appeals stated that it was sufficient that the arbitration panel had reached a "plausible interpretation" of the 1991 agreement. Pet. App. 7a-8a. *See also infra* pp. 10-11 n.3 (describing in second paragraph the federal standard for vacating an arbitration award and the different Illinois standard on the same matter).

The amendment was to footnote 1 in the court of appeals' opinion. In its original opinion, the court had asserted that "[a]part from waiver, [petitioner] does not challenge the district court's order compelling arbitration." Pet. App. 7a n.1. On that basis, the court concluded that it could "express no view as to whether the district court properly compelled arbitration in Chicago, even though the federal action was filed in California." *Id.*; *see* 9 U.S.C. § 4 (arbitration "shall be within the district in which the petition for an order directing such arbitration is filed"). When petitioner pointed out in seeking rehearing that in fact he had made precisely this argument based on § 4 of the FAA, the court of appeals amended the footnote to acknowledge that petitioner "contends that if federal law applies, the district court improperly ordered arbitration in Chicago, as opposed to the Southern District of California." Pet. App. 33a (amending Pet. App. 7a n.1).

The court nonetheless refused to entertain the assignment of error, stating that petitioner "failed to raise this issue [in 1997] in opposing Cook's motion to compel arbitration." *Id.* at 34a. The statement is true, but the reasoning is astonishing. The court of appeals entirely lost sight of the fact that the procedural posture of the case in 1997 prevented petitioner from even considering raising the point. *Arbitration was ordered in 1997 pursuant to the Illinois law that the parties and the district court all then agreed controlled.* Petitioner had no way of predicting that the Ninth Circuit several years later would retroactively apply the FAA to Cook's motion to compel arbitration. Nor could he have predicted the unfair position that he would be left in because of the Ninth Circuit's retrospective application of the FAA.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for the Court to confirm—consistently with its past decisions—that parties to an arbitration agreement may agree to apply state law to all

aspects of an arbitration and that in that event federal courts should uphold and enforce that agreement. This confirmation, which may be accomplished by summarily reversing the judgment of the court of appeals and remanding for further proceedings, would ensure that petitioner is not disadvantaged by the unfair procedure whereby the district court applied Illinois law in compelling arbitration (even in rejecting petitioner's waiver argument, *see* Pet. App. 29a & n.3) but the Ninth Circuit then switched to federal law when petitioner renewed its argument on appeal that Cook had waived its right to arbitration. More broadly, such a ruling would be a useful reminder, in light of the Court's recent cases considering matters of this type, that federal courts are required to respect and enforce parties' contractual arrangements in this context, even if they call for state law to apply to rules of arbitration.

Two recent decisions of this Court collectively demonstrate the importance that the Court has attached to federal courts' enforcing parties' arbitration agreements in all their particulars. First, in *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989), this Court considered the effect of a contractual choice-of-law provision under which California law governed any dispute between the parties. The court refused to set aside the California Court of Appeal's conclusion that this clause "mean[t] that the parties had incorporated the California rules of arbitration into their arbitration agreement." *Id.* at 474. In explaining this refusal to use the FAA, the Court observed that the FAA "confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" *Id.* at 474-75 (quoting 9 U.S.C. § 4). Similarly, the Court stated the following:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a

> choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend [any] policy embodied in the FAA.

Id. at 476. In these circumstances, there can be no doubt that the parties here were entitled to agree to the application of Illinois law on all matters related to the arbitration.

This Court returned to the question of state versus federal law in parties' agreements concerning arbitration in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The specific holding was that the provision in an arbitration contract that the agreement "shall be governed by the laws of the State of New York" did not require that punitive damages be excluded from consideration in a dispute between the parties, even though New York law barred punitive damages in arbitration. *Id.* at 58-59 & n.2, 64. The Court concluded that the just-quoted choice-of-law provision was not sufficient to displace the presumption that the FAA would govern questions concerning the authority of arbitrators (and nothing in the FAA bars arbitrators from awarding punitive damages). The Court did not doubt, however, that parties to arbitration contracts remain free to contract for state rules of arbitration, as had occurred in *Volt*. *See id.* at 57-58.

It is apparent that, when viewed in light of this principle that the parties are free to contract for state rules of arbitration, the Ninth Circuit's decision here was incorrect. Specifically, the court should have resolved *all* questions related to arbitration here under Illinois law. It thus should have considered petitioner's argument that the district court, in its 1997 order concluding that Cook had not waived its right to arbitration, had misinterpreted Illinois law.

The Ninth Circuit was incorrect in believing that this principle could be disregarded under the view that the

contractual language manifesting the parties' intention to apply Illinois law is only a substantive choice-of-law provision, as was the case in *Mastrobuono* (where the Court found federal law not to be displaced). Unlike *Mastrobuono*, here there was more than simply this provision. Specifically, the parties and the district court had *agreed* in 1997 that Illinois law governed even arbitrability questions. *See supra* p. 4. The Ninth Circuit was thus incorrect in disregarding this unequivocal unanimous consent of the parties that Illinois law as set forth in the Uniform Arbitration Act be applied.

This switch by the courts from Illinois to federal law not only harmed petitioner but was especially unfair. The former is true because the switch precluded petitioner from demonstrating that respondent Cook had waived the right to compel arbitration.[3] The latter is true because the Ninth

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[3] This is so because, unlike the federal law applied by the Ninth Circuit in ruling against petitioner, Illinois law would not have required petitioner to demonstrate prejudice in order to establish that Cook's submission of substantive issues to the court had resulted in a waiver of its right to compel arbitration. *Compare* Pet. App. 6a (ruling against petitioner because petitioner "has not shown how he was prejudiced by Cook's delay in moving to compel arbitration," as required by Ninth Circuit precedent) *with* Petitioner's CA9 Brief at 10-12 (demonstrating that under Illinois law Cook's "'[s]ubmitting substantive issues to the court for determination'" constituted "'an abandonment'" of its "'contractual right to arbitration,'" entirely "'*[a]part from [any] prejudice*'") (quoting *Atkins v. Rustic Woods Partners*, 171 Ill. App. 3d 373, 379, 525 N.E.2d 551, 555-56 (1988)) (emphasis added).

It is useful further to appreciate that the employment of federal rather than Illinois law resulted in the application of a different standard to petitioner's request to vacate the arbitration award. Whereas the federal law applied by the Ninth Circuit provides for enforcement of an arbitration award so long as, "'on its face, the award represents a plausible interpretation of the contract,'" Pet. App. 7a (quoting *Sheet Metal Workers Int'l Ass'n, Local 359 v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 653 (9th Cir. 1988)); *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope

Circuit compounded the harm when it also refused to consider petitioner's argument that, *if* federal law was applicable on arbitration-related questions (as the Ninth Circuit concluded), the district court erred by requiring arbitration in Chicago (i.e., outside of the district). The Ninth Circuit's basis for that refusal was that petitioner had "failed to raise this issue [in 1997] in opposing Cook's motion to compel arbitration." Pet. App. 34a (amending footnote 1 of the court of appeals' opinion in denying rehearing); *see supra* p. 7. The court simply ignored the essential fact that petitioner could not have brought up the issue in 1997, for—in *Cook's* words—"in 1997, everyone (the district court, Sovak, and Cook) relied on the choice-of-law provision to conclude that the IUAA [i.e., Illinois law] applied" (Cook's CA9 Brief at 16),[4] and *Illinois* law does not

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of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision"), Illinois law permits an arbitration award to be set aside if there is a mistake of fact or law appearing on the face of the award. *See Garver v. Ferguson*, 76 Ill. 2d 1, 10-11, 389 N.E.2d 1181, 1184 (1979); *Shearson Lehman Bros., Inc. v. Hedrich*, 266 Ill. App. 3d 24, 28, 639 N.E.2d 228, 232 (1994). Of course, under petitioner's view of the case (i.e., that Cook waived its right to arbitration), this issue need never be reached, but it demonstrates another distinction between the law applied by the court of appeals and the law sought by petitioner.

[4] This is a complete response to the Ninth Circuit's attempt to obscure the fact of Cook's reliance on Illinois law by stating that, even though "Cook expressly stated [in the district court] that Illinois law, *and not the FAA*, generally applied to its motion . . . , Cook [also] provided a lengthy description of federal waiver jurisprudence in [its reply] responding to [petitioner's] waiver argument, and it specifically relied upon the FAA." Pet. App. 6a (emphasis added). Cook presumably relied on the FAA in its reply because (as it stated to the district court in seeking to compel arbitration, on the same page where it stated that Illinois and not federal law was applicable) the FAA "contains language nearly identical to the UAA [i.e., the Uniform Arbitration Act, which Illinois had adopted]." CA9 ER 93 n.14. In other words, Cook cited federal law in support of its argument as to how the Illinois act should be construed, and it did so out

afford the argument based on § 4 of the FAA that arbitration can be ordered only in particular places.

In these circumstances, the Court should take the extraordinary but scarcely unprecedented step of summarily reversing the judgment of the Ninth Circuit. *Compare Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) (*per curiam*) (summarily reversing Ninth Circuit opinion that flouted basic principles of arbitration law). The Ninth Circuit has failed to honor the basic principle established in this Court's precedents that arbitration agreements should be upheld even where they call for the application of state law in place of otherwise applicable federal law on matters related to the rules of arbitration. This disregard for the teaching of these precedents has caused manifest (a) prejudice and (b) unfairness for petitioner, for it meant (a) that petitioner could not prevail on the claim that Cook had waived arbitration and (b) that, when combined with the indefensible conclusion that petitioner had waived his argument under § 4 of the FAA by not raising it in 1997 even though the application of Illinois law (as agreed upon by all parties) meant that there then was no such argument to be raised, petitioner would not be heard even on his arguments based on the federal law that the court of appeals found applicable. This petition thus satisfies both the criterion of "decid[ing] an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c), and that of "so far depart[ing] from the accepted and usual course of judicial proceedings, or sanction[ing] such a

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of the apparent belief that Illinois law and federal law are identical—which is generally true, but is not with regard to the crucial question of the standard for waiver of the right to compel arbitration, *see supra* p. 10 n.3. It remains the case that, to this day, Cook has never asserted to any court that the citation of federal authority on the issue of waiver in its reply in the district court should be taken as evidence that it intended the district court to apply the FAA rather than the UAA as adopted in Illinois.

departure by a lower court, as to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a).

Even beyond correcting the arguably fact-specific errors of the court of appeals here (all cases are fact-specific at some level, of course), summary reversal would serve the broader purpose of reminding courts and litigants that *Volt* and *Mastrobuono*—the first of which refused to overturn a decision applying state rules of arbitrability and the second of which concluded that state rules of arbitrability did not apply—are entirely compatible. This Court made that point in its decision this year in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), where it explained, citing *Volt*, that "'[a]rbitration *under [the FAA]* is a matter of consent, not coercion.'" *Id.* at 764 (bracketed phrase inserted by *Waffle House* Court, emphasis added here); *see also id.* n.9 ("*Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement without regard to the federal policy [concerning] arbitration"). It is evident that the Ninth Circuit at least does not appreciate the point. Summary reversal would bring it home.[5]

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[5] An alternative course of action would be for the Court to enter a "GVR" order—i.e., grant certiorari, vacate the judgment, and remand for the Ninth Circuit to reconsider its decision in light of *Waffle House*. Although it is true that this Court decided *Waffle House* before the Ninth Circuit issued its opinion here (barely so, for the former was issued on January 15 of this year and the latter on February 19), it is settled law that a GVR order is not restricted to situations where there is an *intervening* precedent of this Court after the lower court's decision and before this Court's action on a petition for certiorari, but may also appropriately be entered where this Court's decision was entered *before* the lower court's decision. *See Lawrence v. Chater*, 516 U.S. 163, 169 (1996) (*per curiam*) (noting with approval that in *Robinson v. Story*, 469 U.S. 1081 (1984), the Court "GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the [decision of the court of appeals] that was the subject of the petition for certiorari"); *Stutson v. United States*, 516 U.S. 193 (1996) (*per curiam*) (GVR'ing for court of

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the court of appeals should be summarily reversed and the case remanded for further proceedings consistent with the Uniform Arbitration Act as adopted in Illinois; in the alternative, the judgment should be vacated and the case remanded for further consideration in light of this Court's decision in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002).

Respectfully submitted,

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appeals to reconsider its decision in light of a Supreme Court decision entered more than one year before the court of appeals' judgment was entered).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55298
D.C. NO. CV-96-01617RMB (CGA)

MILOS SOVAK, M.D.; BIOPHYSICA, INC.,
Plaintiffs-Appellants,

v.

CHUGAI PHARMACEUTICAL CO., a corporation of the Empire of Japan; COOK IMAGING CORPORATION, an Indiana corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted
October 4, 2001—Pasadena, California
February 19, 2002, Filed
[Amended by April 10, 2002 Order,
see *infra* Appendix D]

Before: DIARMUID F. O'SCANNLAIN AND RICHARD A. PAEZ, *Circuit Judges*, AND SAMUEL P. KING,* *District Judge*.

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

O'SCANNLAIN, *Circuit Judge*:

We must decide whether federal or state law governs the right to compel arbitration when the underlying agreement contains only a general state choice-of-law clause.

I

In 1986, Milos Sovak, while chairman of the board of Cook Imaging Corporation ("Cook"), co-invented an x-ray enhancing drug called "Ioxilan." Sovak promptly assigned his patent rights to Ioxilan in the United States and Japan to Cook.

In 1987, Sovak, on behalf of Cook, contracted with Chugai Pharmaceutical Company ("Chugai") for assistance in obtaining approval from the Japanese Ministry of Health and Welfare (the "Ministry") for the sale of Ioxilan in Japan. Under the Ioxilan contract, Chugai agreed to perform clinical trials in Japan and to file an application for final approval with the Ministry. Upon final approval, Chugai had the option of becoming Cook's exclusive licensee to sell Ioxilan in Japan in exchange for the payment of royalties. Chugai also had the option of terminating the contract at any time upon sixty days written notice.

In 1991, Sovak stepped down as chairman of Cook. Sovak and Cook entered into a Stock Redemption Agreement under which Cook agreed to pay Sovak thirty-three percent of any royalties received under the Ioxilan contract with Chugai. The parties also agreed to arbitrate all disagreements in Chicago pursuant to Illinois law and the rules of the American Arbitration Association.

In 1993, Chugai completed the clinical trials of Ioxilan in Japan and filed an application for final approval with the Ministry. While that application was pending, Chugai gave written notice to Cook that it intended to exercise its option to terminate the Ioxilan contract. In other words, Chugai opted

not to become Cook's exclusive licensee for the sale of Ioxilan in Japan, and therefore would not be obligated to pay any royalties to Cook.

With the application still pending, Cook entered into a contract with Japanese Tobacco, Inc., which agreed to pay $5 million for the exclusive right to sell Ioxilan when the Ministry issued its final approval, which indeed a month later, it did.

Not surprisingly, Sovak was not pleased with the way events had unfolded. The Stock Redemption Agreement provided that he would receive a percentage of the royalties paid by Chugai to Cook, but of course Chugai would not pay any royalties to Cook because it opted to terminate the Ioxilan contract. Further, Cook refused to share with him any portion of the $5 million received from Japanese Tobacco. Sovak apparently would receive no compensation at all from the sale of Ioxilan in Japan.

In 1996, Sovak sued Chugai in California state court, alleging that Chugai breached the Ioxilan contract with Cook. Chugai successfully removed the action to federal court, and the district court dismissed Sovak's claims without prejudice. Sovak later filed a second amended complaint (the "SAC"), asserting conversion claims against Cook. He claimed that the Stock Redemption Agreement gave him an equitable lien on any payments made to Cook relating to the sale of Ioxilan in Japan. Sovak claimed, therefore, that Cook converted part of the $5 million paid by Japanese Tobacco by not sharing any of it with him. Cook successfully moved to dismiss the second amendment [*sic*] complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Sovak subsequently filed a third amended complaint alleging various claims against Cook and Chugai. Significantly, Sovak claimed that Cook breached the Stock Redemption Agreement by not sharing any portion of the

payment from Japanese Tobacco. Cook moved to dismiss Sovak's claims in favor of arbitration, relying upon its arbitration provision. Sovak argued that Cook had waived its right to compel arbitration by previously successfully moving to dismiss the second amended complaint for failure to state a claim. The court dismissed Sovak's claims, compelled arbitration, and stayed the proceedings as to Chugai pending the arbitration.

Pursuant to the court's order, Sovak and Cook proceeded to arbitration in Chicago, Illinois. The arbitration panel issued an award in favor of Cook, without allowing Sovak an opportunity for a hearing. Sovak then filed a motion with the district court to vacate the award. The court denied the motion and dismissed the claims against Chugai. Sovak filed this timely appeal.

II

A

Sovak claims that Cook waived its right to compel arbitration by successfully moving to dismiss the second amendment [*sic*] complaint for failure to state a claim. The parties initially disagree about the applicable law governing waiver: Sovak argues that Illinois law applies, while Cook contends that federal law governs.

Parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16. *See Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). However, parties must clearly evidence their intent to be bound by such rules. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61-62 (1995); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000). In other words, the strong default presumption is that the FAA, not state law, supplies the rules for arbitration. *See*

Wolsey, Ltd. v. Foodmaker, Ltd., 144 F.3d 1205, 1213 (9th Cir. 1998); *see also Roadway Package Sys. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) (stating that parties must evidence a "clear intent" to incorporate state law rules for arbitration).

Sovak claims that Illinois law supplies the rules for arbitration because the Stock Redemption Agreement's arbitration provision contains an Illinois choice-of-law clause. But, a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration. *See Wolsey, Ltd.*, 144 F.3d at 1213 (stating that "*Mastrobuono* dictates that general choice-of-law clauses do not incorporate state rules" for arbitration); *see also Chiron Corp.*, 207 F.3d at 1131 (same). Rather, we will interpret the choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration. Therefore, we must conclude that the Agreement incorporates the FAA's rules for arbitration, but Illinois substantive law applies in all other respects.

We further conclude that waiver of the right to compel arbitration is a rule for arbitration, such that the FAA controls. Rules for arbitration include principles that affect the "allocation of power between alternative tribunals." *Mastrobuono*, 514 U.S. at 60. Waiver, in the arbitration context, involves the circumstances under which a party is foreclosed from electing an arbitration forum. Therefore, the question of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (explaining that "an allegation of waiver" must be resolved in light of the FAA's preference for arbitration). Accordingly, the FAA, and not Illinois law, supplies the standard for waiver.

Sovak, however, argues that Cook is nonetheless foreclosed from arguing that the FAA applies. The district

court applied Illinois law in determining that Cook had not waived its right to compel arbitration. Sovak claims that Cook invited the district court's error, and therefore is precluded from arguing otherwise on appeal here.

The invited error doctrine holds that "[O]ne may not complain on review of errors below for which he is responsible," *Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336-37 (9th Cir. 1985) (internal quotation marks omitted), and extends to choice of law questions. *See Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n*, 218 F.3d 1085, 1089 (9th Cir. 2000). In its motion to dismiss in favor of arbitration, Cook expressly stated that Illinois law, and not the FAA, generally applied to its motion. However, Cook provided a lengthy description of federal waiver jurisprudence in responding to Sovak's waiver argument, and it specifically relied upon the FAA. Accordingly, Cook did not invite the district court's error in applying Illinois law.

B

Sovak asserts that Cook waived its right to compel arbitration under the FAA by successfully moving to dismiss the second amended complaint for failure to state a claim. In order to prevail, Sovak must show (1) Cook had knowledge of its existing right to compel arbitration; (2) Cook acted inconsistently with that existing right; and (3) he suffered prejudice from Cook's delay in moving to compel arbitration. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). Sovak bears a "heavy burden of proof" in showing these elements. *Id.*

We conclude that Sovak has not met his burden because he has not shown how he was prejudiced by Cook's delay in moving to compel arbitration. Indeed, Sovak has made no attempt on appeal to articulate how he was prejudiced.

Accordingly, we hold that Cook did not waive its right to compel arbitration under the FAA.[1]

III

Sovak also challenges the district court's denial of his motion to vacate the arbitration award. Specifically, he claims that the arbitration panel misconstrued the Stock Redemption Agreement and that he was denied a fundamentally fair hearing.

A

Judicial review of an arbitration panel's decision is "extremely narrow." *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1485 (9th Cir. 1991). "If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." *Sheet Metal Workers Int'l Ass'n, Local 359 v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 653 (9th Cir. 1988). Sovak cannot meet this high burden of showing that the panel misconstrued the Agreement.

Cook agreed to provide Sovak "thirty-three percent (33%) of the royalties and other compensation received by Cook . . . under [the Ioxilan] contract between Cook and Chugai." Sovak contends that the approved Ministry application to sell Ioxilan in Japan represents "other compensation." He

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[1] Apart from waiver, Sovak does not challenge the district court's order compelling arbitration. Therefore, we express no view as to whether the district court properly compelled arbitration in Chicago, even though the federal action was filed in California. *Compare Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941) (holding that § 4 of the FAA limits a court to ordering arbitration within the district in which the suit was filed) *with Dupuy-Busching Gen. Agency v. Ambassador Ins. Co.*, 524 F.2d 1275, 1276-78 (5th Cir. 1975) (concluding that § 4 bars ordering arbitration in another judicial district only when the party seeking to compel arbitration filed the federal suit).

therefore claims that he is entitled to its fair market value. Nevertheless, it is plausible to construe the term "other compensation" to refer to amounts directly received in connection with the sale of Ioxilan in Japan. Because this plausible interpretation excludes the final Ministry application, Sovak is not entitled to relief.

B

Sovak also claims that the arbitration proceedings were fundamentally unfair because the panel denied him an oral hearing. Sovak does not contend that he lacked the opportunity to submit any relevant written materials, nor can he show any provision of the FAA which guarantees oral presentation. The panel's decision shows that it carefully considered Sovak's claims. In short, we cannot conclude that a party is denied a fundamentally fair hearing simply because he was denied oral presentation.

IV

In his reply brief, Sovak argues that the district court erred in dismissing his claims against Chugai. Because Sovak did not argue this issue in his opening brief, we decline to consider it. *See, e.g., Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. Civil 96-1617-B (RBB)

MILOS SOVAK, M.D., AND BIOPHYSICA,
Plaintiffs,

VS.

CHUGAI PHARMACEUTICAL, INC.,
AND COOK IMAGING CORP.,
Defendants.

ORDER: (1) DENYING PLAINTIFFS' MOTION TO VACATE ARBITRATION AWARD WITH RESPECT TO DEFENDANT COOK; (2) LIFTING THE EXISTING STAY WITH RESPECT TO DEFENDANT CHUGAI'S PENDING MOTION TO DISMISS; (3) GRANTING CHUGAI'S PENDING MOTION TO DISMISS; AND (4) TERMINATING THE CASE.

ENTERED ON 1/13/00

Plaintiffs' Motion to Vacate the Arbitration Award is presently before this Court. For the reasons set forth below, this Court denies Plaintiffs' Motion to Vacate Arbitration Award with respect to Defendant Cook Imaging Corporation ("Cook"), lifts the September 17, 1997 stay with respect to Chugai Pharmaceutical Co.'s ("Chugai") pending Motion to Dismiss, and grants Chugai's previously deferred Motion to Dismiss.[1]

---

[1] This Court deferred Chugai's Motion to Dismiss on September 17, 1997.

I. INTRODUCTION

Procedural and Factual Background

The initial complaint was filed in San Diego Superior Court on August 9, 1996 and removed to federal court on September 18, 1996. Chugai immediately filed a motion to dismiss. After the Court dismissed Plaintiffs' first amended complaint ("FAC") with leave to amend on November 15, 1996, Plaintiffs filed a second amended complaint ("SAC") on December 16, 1996. After additional litigation, this Court ordered Plaintiffs and Defendant Cook to submit to arbitration on September 17, 1999, during which time the proceedings against Defendant Chugai were stayed pending the outcome of the arbitration.

Plaintiffs and Cook conducted arbitration in Illinois. The arbitration was to be "construed and interpreted in accordance with the laws of the State of Illinois." Arthur Aff. at Ex. B ¶ 16(g). The arbitration proceeding, Case No. 51 Y 199 00107 98, was concluded on July 19, 1999.

The facts of this case are set forth in detail in the Court's orders, dated November 15, 1996 and April 18, 1997, respectively. In brief, Plaintiffs alleged that in 1986 Milos Sovak, M.D. ("Sovak"), the Chairman of the Board of Cook, co-invented a compound known as concerned "ioxilan," an experimental x-ray enhancing drug. SAC ¶ 6. Defendant Cook was assigned all the rights to the United States and Japanese patents on the compound. *Id.* In an attempt to market the compound, Sovak, acting as an agent of Cook, contacted Defendant Chugai, a major pharmaceutical company in Japan. On March 26, 1987, Sovak negotiated and signed a contract on behalf of Cook with Chugai. Under this contract, Chugai was to perform preliminary studies of ioxilan in Japan for marketing approval by the FDA and the Japanese Ministry of Health and Welfare ("MHW").

On January 29, 1991, Sovak ceased his association with Cook and entered into a SRA ("Stock Redemption Agreement") under which Cook, for consideration, agreed to pay Plaintiffs either 33 percent of any royalties Cook received from Chugai pursuant to the 1987 Agreement or $2.5 million at Cook's option. *See* SAC ¶ 10. Since the option expired on December 31, 1996 and Cook did not elect to pay Sovak the $2.5 million, Sovak was entitled to 33 percent of any royalties received from Chugai under the 1987 Agreement.

On August 12, 1993, Chugai filed a New Drug Application (NDA) in its own name with the MHW. *See id.* at ¶ 13. It is the rights under the SRA and Chugai's filing of the NDA that Plaintiffs allege form the basis of their claim. Plaintiffs additionally allege that although Chugai "purportedly" terminated the 1987 Agreement effective November 23, 1993, there was never a true termination, instead "only a continuation and modification of that Agreement." *See id.* at ¶ 16-17. Further, Chugai allegedly assigned the approved NDA to Cook who thereafter transferred it to Japan Tobacco, Inc. for $5 million plus additional royalties. *See id.* at ¶ 22. It is the refusal of Cook to pay Plaintiffs any royalty from the $5 million received from Japan Tobacco which precipitated this suit.

While in arbitration, Plaintiffs submitted their third amended complaint ("TAC") and added an additional claim against Cook for breach of the covenant of good faith and fair dealing. *See* Declaration of Lawrence E. Eden, Ex. 1. Plaintiffs also added claims for "civil conspiracy for breach of constructive trust" and "civil conspiracy for breach of resulting trust" against Defendant Chugai in the TAC. Cook then filed two counterclaims and brought a motion for summary judgment before the Arbitration Panel ("Panel"). Plaintiffs objected to the motion for summary judgment and requested an oral hearing on the motion which the Panel denied.

On July 19, 1999, the Panel issued its award of arbitration ("Award"). The Award granted Cook's motion for summary judgment and made a final award of fees and expenses. The Panel dismissed each of the Plaintiffs' claims against Cook on their merits. *See* Cook's Opposition to Motion to Vacate at 12. On October 18, 1999, Plaintiffs filed the instant motion to vacate the arbitration award.

II. ANALYSIS

A. Jurisdiction

Since this Court ordered this case to arbitration, albeit in Illinois, this Court still retains jurisdiction over this matter. Therefore, Plaintiffs' Motion to Vacate the Arbitration Award is properly before this Court.

B. Proper Application of Law

In deciding whether or not this Court should vacate the arbitration award, federal law applies. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991); *Michigan Mut. Ins. Co. v. Unigard Security Ins. Co.*, 44 F.3d 826, 830 (9th Cir. 1995). Under *Michigan Mutual*, the only grounds for vacating an arbitration award are: "(1) Where the Award was procured by corruption, fraud or undue means; (2) Where there was evident partiality or corruption in the Arbitrators, or either of them; (3) Where the Arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) Where the Arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*

However, in deciding whether or not the Panel conducted the arbitration process in a proper manner, Illinois law applies. The SRA has a general choice-of-law clause which

provides, "This Agreement shall be construed and interpreted in accordance with the laws of the State of Illinois." Arthur Aff. at Ex. B ¶ 16(g).

C. Motion to Vacate the Arbitration Award

Plaintiffs' [*sic*] set forth four theories under which, it [*sic*] argues, the Award should be vacated by this Court. Plaintiffs argue that: (1) the arbitrators acted improperly when they refused to grant Plaintiffs the opportunity for oral argument, (2) the award was not issued in a timely manner, (3) the award was improperly decided on a summary judgment motion, (4) the award contains a mistake of law which appears on its face. This Court finds none of these arguments persuasive.

1. Oral Argument

Plaintiffs' argument that an arbitration award should be overturned merely on the basis that Plaintiffs were not afforded an opportunity to present oral argument is unpersuasive. Plaintiffs have cited no binding case law that an arbitration award should be overturned on this basis; and this Court has not been able to find authority to support this contention. The cases cited by Plaintiffs merely state the blanket proposition that oral argument can be helpful to a tribunal in reaching a judicial determination. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277 (9th Cir. 1981) ("oral argument serves the interests of justice"); *Mediterranean Construction Comp. v. State Farm Fire & Casualty Comp.*, 66 Cal. App. 4th 257 (1998) (". . . both written and oral argument are complementary parts of good judging . . ."). Interesting to note is that Plaintiffs cite to Ninth Circuit federal law and California state law to support this argument after they argued that Illinois law is the appropriate law to use.

Plaintiffs also refer to Rules 32(a) and (c) of the Commercial Dispute Resolution Procedures ("CDRP") regarding "Conduct of Proceedings." Rule 32(a), however, states that

"[t]he arbitrator has the discretion to vary th[e] procedure [of the presentation of evidence and witnesses] provided that the parties are treated with equality."

Plaintiffs' argument lacks merit. Courts and other judicial tribunals routinely decide motions on the papers without the benefit of oral argument. Moreover, Rule 32(a) explicitly affords the arbitrator discretion regarding how to conduct arbitration proceedings. Accordingly, Plaintiffs' motion should be denied with respect to this argument.

2. Untimeliness

Plaintiffs argue that the lateness of the arbitration award voids the award. Again, this argument is wholly unpersuasive. Plaintiffs cite to Rules 37 and 43 of the CDRP regarding "Time of Award." Rule 43 provides that the award should be made promptly by the arbitrator and . . . no later than 30 days from the date of . . . the [American Arbitration Association's] ("AAA") transmittal of the final statements and proofs to the arbitrator." [*sic*: no opening quotation mark] (Plaintiffs have merely cited to the rules; they have not submitted any case law to support their contention in this regard.)

Under *Vascular Surgery Assoc. v. Business Systems, Inc.*, 628 N.E.2d 285, 286 (Ill. Ct. App. 1993), the court dealt with an award which was five months late. The court held that "mere tardiness in the filing of an award will not obviate the effects of arbitration unless the objecting party can show . . . [injury] by the delay or the time within which the award has been rendered [was] unreasonable. [*sic*] *Id.* (citations omitted). Here, the last brief was received by the Panel on April 12, 1999. The Award was not rendered until July 19, 1999. While it is true that over three months passed before an Award was rendered, this Court does not find that this relatively minor tardiness by the Panel would be prejudicial to the parties involved. Accordingly, Plaintiffs' motion should be denied with respect to this argument.

3. Summary Judgment

Plaintiffs argue that the Panel acted improperly in considering Defendant Cook's Motion for Summary Judgment. The Panel itself "acknowledge[d] that there is no specific reference in the Rules to a summary judgment procedure [and found] that the few cases cited by both parties are either irrelevant or unpersuasive . . ." Award at 2. Plaintiffs also argue that not only did the Panel act improperly by considering Defendant's Motion for Summary Judgment, but the process by which it entertained the motion was prejudicial. Plaintiffs point to the fact that, in their estimation, the lynchpin issue of *ejusdem generis*[2] was raised for the first time in Defendant's 34-page Reply Brief. Although Plaintiffs were given the opportunity to respond in their sur-reply brief, this brief was limited to 10 pages. Plaintiffs claim that this limitation on the number of pages of the sur-reply coupled with the Panel's refusal to hear oral argument prejudiced Plaintiffs.

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[2] Black's Law Dictionary defines "ejusdem generis" as follows:

> Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. *U.S. v. LaBrecque*, D.C.N.J., 419. F.Supp. 430, 432. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention. Under "ejusdem generis" canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. *Campbell v. Board of Dental Examiners*, 53 Cal. App.3d 283, 125 Cal. Rptr. 694, 696.

Defendant Cook observes that although the AAA Rules do not specifically provide for a summary judgment proceeding, motions for summary judgment are routinely decided in an arbitration forum. *See* Award at 2 (in which the Panel references its knowledge of issuing summary judgment motions and that the motions are treated as akin to the motions in state and federal court).

Here, Plaintiffs do not specifically explain to the Court how its [*sic*] rights were prejudiced by not being afforded the opportunity to submit a longer sur-reply brief or to present oral argument to the Panel. Plaintiffs merely state in conclusory terms that they were prejudiced by being "limited by the Arbitrators to a ten-page reply," *See* Memo. P&A's p.8 fn. 8, but Plaintiffs do not demonstrate to this Court *why* 10 pages was not enough space to address the narrow, singular doctrine of *ejusdem generis*.

Plaintiffs do not cite, and this Court has not been able to find, specific case law to support its argument protesting summary judgment. Under *Michigan Mutual*, 44 F.3d at 830, an arbitration award may be vacated "[w]here the Arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced . . ." *Id.* This Court is not persuaded that the Panel's limitation of 10 pages for the sur-reply was unreasonable, much less that it constituted the "misconduct" or "misbehavior" necessary to vacate the Award. *See id.* Nor is there any evidence before this Court to demonstrate that the Arbitrators "refus[ed] to hear evidence pertinent or material to the controversy." Accordingly, it is my opinion that Plaintiffs' motion should be denied with respect to this argument.

4. Mistake of Law

Plaintiffs argue that the Award contains a mistake of law on its face in that the Panel failed to properly apply contract law and properly interpret the terms of the contract. For this reason, Plaintiffs contend that the Award is void.

Plaintiffs argue that the Panel's determination that "a filed, unapproved AAMD [was to] be excluded," *See* Pl. Memo P&A 13:7, stands in contradistinction to the Panel's earlier conclusion that the contract term "and other compensation" is plain on its face. According to Plaintiffs, "The Panel stated that meaning of the phrase 'and other compensation' can be determined from the plain words of the SRA which reflect the intent of the parties.") [*sic*: no opening parenthesis]. *See id.* at 10:16-18; Award at 4. Plaintiffs claim that "the Arbitration Panel simply invented out of whole cloth an additional requirement for plaintiffs' recovery, i.e. that the royalties or other compensation received by [Cook] from Chugai under the License Agreement must '[relate] to the sales in Japan of Ioxilan by Chugai.'" *See id.* at 11:19-24. Plaintiffs contend that "[a]n examination of the SRA reveals no mention of this requirement. There are no such 'plain words' or words of any type or kind which suggest this." *See id.* at 11:27-28. Plaintiffs, apparently, cannot reconcile how the unambiguous term "compensation" may be reconciled with the Panel's decision to define the term "compensation" as relating to "the sales in Japan of Ioxilan by Chugai."

Under *Michigan Mutual*, Plaintiffs carry the burden of demonstrating to this Court that "the arbitrators recognized the applicable law and then ignored it." *Michigan Mutual*, 44 F.3d at 826. This is a rather high hurdle. Under *Barnes v. Logan*, 122 F.3d 820, 821 (9th Cir. 1997), the arbitrator must "manifest[] a complete disregard of the law" in order for the arbitration to be vacated. This Court is unconvinced that such wrongdoing occurred here. This Court finds Plaintiffs' argument that the Panel ignored or disregarded the relevant

law in reaching its conclusions to be unpersuasive. It appears that the Panel applied and interpreted the contract term "and other compensation" in a way that displeased Plaintiffs. By relating the term "compensation" with "the sales in Japan of Ioxilan by Chugai," it appears that the Panel merely sought to give this term its full meaning.

D. Stay of Claim against Chugai

The Court held in its previous order of September 17, 1997 that "in order to avoid the risk of inconsistent results, this Court stays the claims against Chugai until the resolution of Plaintiffs' claims in arbitration." September 17, 1997 Court Order at 8:17-19.

Since arbitration in this case has concluded, no reason exists for this Court to continue the previously imposed stay. The Panel dismissed each of the Plaintiffs' claims against Cook on their merits. *See* Cook's Opposition to Motion to Vacate at 12. The only claims alleged in the TAC by Plaintiffs against Defendant Chugai were for "civil conspiracy for breach of constructive trust" and "civil conspiracy for breach of resulting trust," both claims which Cook defeated at the arbitration. Since these claims against Cook, the alleged co-conspirator of Chugai, were defeated at arbitration, no reason exists for this Court to not dismiss these same two claims against Chugai. Accordingly, this Court lifts the stay and grants Chugai's Motion to Dismiss.

II[I]. CONCLUSION

With due consideration of the arguments presented, this Court DENIES Plaintiffs' Motion to Vacate Arbitration Award with respect to Cook, LIFTS the existing stay with respect to Chugai's pending Motion to Dismiss, and GRANTS Chugai's pending Motion to Dismiss. The Clerk shall close the case.

IT IS SO ORDERED.

DATED: 1/11/00

/s/ Rudi M. Brewster
United States Senior District Judge

cc: All Parties
Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NUMBER: 96-1617-B(RB)

SOVAK AND BIOPHYSICA

v.

CHUGAI PHARMACEUTICAL, INC. AND
COOK IMAGING CORP.

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court denies plaintiffs' motion to vacate arbitration award with respect to defendant Cook (106-1), lifts the existing stay with respect to defendant Chugai's pending motion to dismiss, grants Chugai's pending motion to dismiss (66-1)

January 20, 2000

Roberta Westdal, Clerk

(By) Trina Lee, Deputy Clerk

/s/ Trina Lee,

ENTERED ON January 20, 2000

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. Civil 96-1617-B (RBB)

MILOS SOVAK, AND BIOPHYSICA, INC.,
Plaintiff,

VS.

CHUGAI PHARMACEUTICAL, LTD.,
AND COOK IMAGING CORP.,
Defendant.

ORDER: (1) DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S APRIL ORDER (58-1); (2) GRANTING COOK'S MOTION TO DISMISS ALL OF THE CLAIMS WITHOUT PREJUDICE AND ORDERING THE PARTIES TO SUBMIT THEIR CLAIMS TO ARBITRATION (69-1); AND (3) DEFERRING RULING ON CHUGAI'S MOTION TO DISMISS (66-1, 66-2) AND STAYING THE ACTION AGAINST CHUGAI PENDING THE OUTCOME OF THE ARBITRATION PROCEEDINGS

On May 21, 1997, Plaintiffs filed a motion for reconsideration of the Court's order dated April 18, 1997. On July 11, 1997, Defendants, Chugai Pharmaceutical Co. (Chugai) and Cook Imaging, Inc. (Cook) filed separate motions to dismiss Plaintiffs' third amended complaint.

Upon due consideration of the moving and responding papers and the for [*sic*] the reasons discussed below, the Court hereby:

(a) DENIES Plaintiffs' motion for reconsideration of the Court's April order;

(b) GRANTS Cook's motion to dismiss all of the claims without prejudice and ORDERS the parties to submit their claims to arbitration;

and

(c) DEFERS ruling on Chugai's motion to dismiss and STAYS the action against Chugai pending the outcome of the arbitration proceedings.

I. BACKGROUND

A. Procedural and Factual Background [There Is No "Part B"]

This case has been before the Court on two prior motions to dismiss Plaintiffs' first and second amended complaint.[1] After the Court dismissed Plaintiffs' FAC against both defendants, Plaintiffs filed a second amended complaint (SAC). The SAC alleged causes of action against both Chugai and Cook as follows: (1) tortious interference with a contractual relationship against Chugai only; (2) conversion against Chugai only; and (3) civil conspiracy to convert against Chugai and Cook. The SAC alleged essentially the same facts as the original and first amended complaints. Defendants then moved to dismiss the SAC and in an order dated April 18, 1997, the Court dismissed Plaintiff's SAC against both defendants as follows: (1) the Court granted Cook's motion to dismiss both the conversion and conspiracy claims without leave to amend and (2) granted Chugai's

[1] The facts of this case are set forth in detail in the Court's orders dated November 15, 1996 and April 18, 1997.

motion to dismiss the interference and conspiracy claims without leave to amend. Despite these dismissals with prejudice, the Court granted Plaintiffs thirty (30) days leave to file a third amended complaint (TAC) to state a "viable claim against Cook or Chugai that this Court has not previously dismissed."

As provided in the April order, Plaintiffs filed a TAC. Plaintiffs also filed a motion for reconsideration of the April order to the extent that it dismissed Plaintiffs' claims without leave to amend. Defendants each separately filed motions to dismiss the TAC. These three motions are the subject of this order and will be discussed in turn below.

II. DISCUSSION

A. Plaintiffs' Motion for Reconsideration

Plaintiffs move the Court to partially reconsider its April 18, 1997 order to allow Plaintiffs to amend their causes of action for conversion and conspiracy against Cook and their causes of action for interference with contractual relationship and conspiracy against Chugai. Plaintiffs contend that they are entitled to amend these causes of action to plead new facts which can support their theories of recovery.

1. Standard of Law

Federal Rule of Civil Procedure 60(b)[2] permits relief from a judgment or an order for: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ;

---

[2] Plaintiffs claim that the Court should decide this motion for reconsideration using an as "justice so requires" standard. Plaintiffs cite one district court case from the Northern District of New York to support this proposition, however, not only is this case not controlling, Federal Rule of Civil Procedure 60(b) sets forth specific grounds that justify reconsideration of a court's order.

(3) fraud . . . misrepresentation, or other misconduct by an adverse party; (4) a void judgment; (5) satisfaction, release, or discharge of the judgment; or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).

The Ninth Circuit has instructed that "[i]n determining whether Rule 60(b) applies, courts should be mindful that the rules are to be construed to achieve the just determination of every action." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983). However, there is also a compelling interest in the finality of judgments that should not be disregarded lightly. *Id.* Reconsideration under Rule 60(b) "is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No.1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) *cert. denied*, 512 U.S. 1236 (1994).

2. Analysis

Plaintiffs contend that they should be given an opportunity to amend their causes of action that were dismissed with prejudice based on "judicial economy" and the fact that they allegedly did not have the benefit of the recent case, *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445 (1997), when they filed their second amended complaint. *Farmers*, although not decided until February 27, 1997, does not represent "an intervening change in controlling law" so as to justify reconsideration of this Court's April order. With respect to equitable liens, *Farmers* merely reaffirmed existing law and applied that law to the specific facts of the case. Moreover, the *Farmers*' opinion was briefed by both Chugai and Cook in their separate reply papers, *as well as* by Plaintiffs in a "Sur-Reply" brief that was filed on April 14, 1997, before the Court rendered its decision on Defendants'

motions. More importantly, the Court expressly considered and analyzed the *Farmers'* opinion in the April order. *See* April 18, 1997 Order, pp. 6-7.

Plaintiffs additionally assert that the General Security Agreement (GSA) between Plaintiffs and Defendant Cook creates a security interest in favor of Plaintiffs in the patented compound "Ioxilan" and any proceeds of that compound. As such, Plaintiffs contend that they have an equitable lien in the proceeds generated from "Ioxilan" which would then establish a viable conversion cause of action against Cook and a conspiracy to convert cause of action against Chugai. The GSA between Plaintiffs and Cook does not qualify as "newly discovered evidence" justifying reconsideration. Under Ninth Circuit authority, "the failure to file documents in an original motion or opposition does not turn late filed documents into 'newly discovered evidence'" so as to satisfy the standard for reconsideration. *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994). The GSA was available evidence to Plaintiffs at the time the Court originally considered the defendants' motions to dismiss. The fact that Plaintiffs did not rely on this agreement in any of their first three complaints does not allow them the opportunity to plead this agreement as "newly discovered evidence" that satisfies the standard for reconsideration. If this agreement can be used to support a cause of action not previously considered and dismissed by the Court, then Plaintiffs can plead this agreement in support of those causes of action.

Plaintiffs further argue in their motion papers that the Court should allow them to amend their claims "at least once." The Court permitted two amendments before dismissing the claims in the SAC without leave to amend. This Court has been more than generous in allowing Plaintiffs a fair and full opportunity to present their claims to the Court. As the Court

explained in its April order, despite a careful review of Plaintiffs' pleadings, "it is clear to the Court that Plaintiffs can prove no set of facts that would entitle them to relief for conversion or conspiracy to convert." April order, 11:7-9. Despite this conclusion, the Court afforded Plaintiffs an additional thirty days to file a third amended complaint "if Plaintiffs believe[d] that they [could] state a viable claim against Cook or Chugai that this Court has not previously dismissed." *Id.* 11:16-18. The Court has thus allowed Plaintiffs three separate opportunities apart from Plaintiffs' original complaint to state a viable cause of action against the Defendants.

For all of the reasons stated above, the Court DENIES Plaintiffs' motion for reconsideration.

B. Cook's Motion to Dismiss

Plaintiffs' TAC alleges the following six causes of action against Cook: (1) establishment of constructive trust, (2) civil conspiracy to breach constructive trust, (3) establishment of resulting trust, (4) civil conspiracy to breach resulting trust, (5) breach of contract (SRA), (6) breach of contract (General Security Agreement). As discussed in detail below, Cook moves the Court to dismiss all of these claims.

The SRA entered into between Plaintiffs and Cook contains an arbitration clause, which provides in pertinent part:

> The parties hereby agree that *in the event any dispute, breach or disagreement arises between the parties concerning any provision of this Agreement, or the enforcement or interpretation thereof*, the party alleging the existence of such dispute, breach or disagreement shall notify the other party thereof, setting forth in detail its contentions related thereto. During a thirty (30) day period thereafter, the parties shall negotiate amongst themselves in an effort to reach a resolution of the

> dispute, breach or disagreement. If, after expiration of such thirty (30) day period, such dispute, breach or disagreement shall not be completely resolved, then such dispute, breach or disagreement shall be submitted to arbitration by the filing of a demand for arbitration with the American Arbitration Association in the manner required by its rules. . . . The foregoing agreement to arbitrate is expressly limited to disputes, breaches or disagreements under this Agreement and shall not be construed or interpreted to extend to any other agreements between, among and involving the parties hereto . . . .

SRA, pp. 17-18 (emphasis added).

In addition, the SRA contains a choice of law provision that provides in pertinent part:

> This Agreement shall be construed and interpreted in accordance with the laws of the State of Illinois.

Based on the above, the arbitration provision is to be construed and interpreted under Illinois law. Illinois law has substantially adopted the Uniform Arbitration Act (UAA). *See Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 530 N.E.2d 439, 443 (Ill. 1988). The UAA provides in relevant part that:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract . . . .

This Act, like Illinois law, "embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes." *Id.* In the instant case, Cook asserts and Plaintiffs concede that Plaintiffs' fifth cause of action for breach of the

SRA falls within the above arbitration clause. The Court agrees that this claim falls squarely within the confines of the arbitration clause and finds that Plaintiffs' fifth claim for relief should be dismissed and submitted to arbitration. The next question is whether Plaintiffs' other five claims against Cook are also subject to the arbitration agreement. If so, Plaintiffs' entire complaint against Cook will be dismissed and the parties ordered to submit their dispute to arbitration. *See Jacob, et al. v. C & M Video, Inc., et al.*, 618 N.E.2d 1267, 1275 (Ill. App. Ct. 1993).

1. Plaintiffs' other claims

Cook contends that Plaintiffs' other five claims should also be dismissed and submitted to arbitration because each claim is dependent upon an interpretation of the SRA. According to Cook, the constructive trust, resulting trust, conspiracy, and breach of the General Security Agreement claims are all based on the contention that Cook breached the SRA by not paying Plaintiffs "royalties and other compensation" that Plaintiffs were allegedly entitled to pursuant to the SRA. Essentially, Plaintiffs' other five claims require a finding that Cook breached the SRA. As discussed above, the arbitration clause covers "any dispute, breach or disagreement . . . between the parties concerning any provision of [the SRA], or the enforcement or *interpretation* thereof . . . ." Because the other five cause of action are dependent upon the interpretation of royalties and other compensation provision of the SRA and the purported termination of the SRA, the Court finds that these five claims fall within the purview of the arbitration clause and hereby DISMISSES all of Plaintiffs' claims in favor of arbitration.

Plaintiffs make two main arguments against arbitration. First, Plaintiffs claim that Cook has waived its right to enforce the arbitration clause against Plaintiffs by failing to raise the enforceability of the arbitration clause earlier in the case. Plaintiffs cite one California case in which the court

upheld a trial court's finding of waiver based on the defendant's conduct which was "inconsistent with a desire to arbitrate." *See McConnell v. Merrill Lynch, Pierce, Fenner & Smith*, 105 Cal. App. 3d 946 (1980).[3] In *McConnell*, the defendant had answered the complaint, tried to remove the case to federal court, answered two sets of interrogatories, filed three objections to class certification, and participated in five hearings on class certification. The defendant's conduct in *McConnell* in no way parallels the actions taken thus far by Cook. In the instant case, Plaintiffs did not include a claim for breach of the SRA until the instant third amended complaint. In fact, Cook was not even named as a party until the second amended complaint, in which Plaintiffs asserted a claim for conversion against them. Cook's action in moving to dismiss the conversion claim rather making a motion to dismiss in order to submit the matter to arbitration does not constitute a waiver. As the Court verified in its April order, Plaintiffs' claim for conversion was not legally cognizable. The Court thus finds that Cook has not waived its right to arbitrate the instant claims pursuant to the arbitration provision in the SRA.

Plaintiffs additionally argue that the Court should retain jurisdiction over all of the claims in order to promote judicial efficiency and prevent piecemeal litigation. Plaintiffs base this claim in part on the fact that Chugai is not a party to the arbitration agreement and thus the claims against Chugai (and any non-arbitrable claims against Cook) will continue to proceed in the district court while other claims are adjudicated through arbitration. Plaintiffs additionally note that in the event that the Plaintiffs are able to establish a remedial trust, then the breach of contract claim would become moot because Plaintiffs are asserting alternative theories of recovery and are not entitled to receive a double

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[3] As set forth above, Illinois, not California law controls.

recovery. The reverse is true as well. If Plaintiffs were to succeed on their breach of contract claim through arbitration, the other remaining claims would likely be disposed of as well. Moreover, as noted by the Illinois Appellate Court in *Geldermann, Inc. v. Mullins*, 524 N.E.2d 1212, 1216 (Ill. Ct. App. 1988):

> [t]he general rule in Illinois is that courts should enforce arbitration agreements despite the existence of claims that create the potential for duplicative proceedings. Moreover, where the issues are sufficiently interrelated and the result of arbitration may be to eliminate the need for court proceedings, submission of the dispute to arbitration meets the goals of judicial economy and resolving disputes outside the judicial form.

Id. (citing *Dierson v. Joe Keim Builders, Inc.*, 505 N.E.2d 1325, 1327-28 (Ill. Ct. App.), *appeal denied*, 515 N.E.2d 105 (Ill. 1987)). In addition, in order to avoid the risk of inconsistent results, this Court stays the claims against Chugai until the resolution of Plaintiffs' claims in arbitration.[4]

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[4] On September 11, 1997, Plaintiffs filed additional authorities with the Court relating to the arbitration issue. Although Plaintiffs did not file briefs analyzing these cases, one case, *J.F. Inc. v. Vjcik*, 426 N.E. 2d 257 (Ill. App. Ct. 1981), held that in multi-party litigation, where only some of the parties are bound by the arbitration agreement and where arbitration would increase rather than decrease delay, complexity and costs, arbitration should not necessarily be compelled. *Id.* at 261. Part of the rationale for the court's holding was the importance of preventing inconsistent results by sending some parties to arbitration and proceeding in a judicial forum with the other claims and parties. In the instant case, however, compelling arbitration and staying the action in the district court would accomplish this same goal. Once Plaintiffs' claims against Cook are resolved in arbitration, the remaining claims will likely be disposed of or could be summarily adjudicated based on the arbitration results. Enforcing the arbitration provision in the instant case honors the intent of the parties as well as promotes the expeditious resolution of Plaintiffs' claims.

Given the above analysis as well as the strong preference for arbitration that is clearly established in Illinois law, the Court hereby DISMISSES without prejudice all of Plaintiffs' claims against Cook in order to permit the parties to submit the matter to arbitration.

C. Chugai's Motion to Dismiss

Plaintiffs' TAC asserts two cause of action against Chugai: (1) conspiracy to breach constructive trust and (2) conspiracy to breach resulting trust. As discussed above, Plaintiffs [sic] claims against Cook are being dismissed in favor of arbitration. In order to avoid inconsistent results, the Court DEFERS ruling on Chugai's motion to dismiss and STAYS the action against Chugai. It is possible that the result of the arbitration proceeding will dispose of the claims against Chugai. If any claims are still viable once the arbitration procedure has run its full course, this Court can lift the stay and permit any remaining parties to litigate any remaining claims.

III. CONCLUSION

Based on the above analysis, the Court hereby:

(a) DENIES Plaintiffs' motion for reconsideration of the Court's April order;

(b) GRANTS Cook's motion to dismiss all of the claims without prejudice and ORDERS the parties to submit their claims to arbitration;

and

(c) DEFERS ruling on Chugai's motion to dismiss and STAYS the action against Chugai pending the outcome of the arbitration proceedings.

IT IS SO ORDERED.

Dated: Sep 16, 1997

/s/ Rudi M. Brewster
United States District Judge

cc: All Parties
Magistrate Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55298
D.C. NO. CV-96-01617RMB (CGA)

MILOS SOVAK, M.D.; BIOPHYSICA, INC.,
Plaintiffs-Appellants,

v.

CHUGAI PHARMACEUTICAL CO., a corporation of the Empire of Japan; COOK IMAGING CORPORATION, an Indiana corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

ORDER

The opinion filed February 19, 2002 is hereby ordered amended as follows:

Slip Op. at 2702: Delete the entire text of footnote 1 and replace with:

> On appeal, Sovak contends that if federal law applies, the district court improperly ordered arbitration in Chicago, as opposed to the Southern District of California. *Compare Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941) (holding that § 4 of the FAA limits a court to ordering arbitration

within the district in which the suit was filed) *with Dupuy-Busching Gen. Agency v. Ambassador Ins. Co.*, 524 F.2d 1275, 1276-78 (5th Cir. 1975) (concluding that § 4 bars ordering arbitration in another judicial district only when the party seeking to compel arbitration filed the federal suit). Sovak failed to raise this issue in opposing Cook's motion to compel arbitration. As such, we decline to address it. *See, e.g., Animal Prot. Inst. of Am. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) ("Federal appellate courts generally do not consider issues first raised on appeal.").

With this amendment, the panel has voted unanimously to deny the petition for rehearing. Judges O'Scannlian and Paez have voted to deny the petition for rehearing en banc. Judge King recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55298
D.C. NO. CV-96-01617-RMB (CGA)

MILOS SOVAK, MD; BIOPHYSICA, INC.,
Plaintiffs-Appellants,

v.

CHUGAI PHARMACEUTICAL CO., a Corporation of the Empire of Japan; COOK IMAGING CORPORATION, an Indiana corporation,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of California (San Diego).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District court in this cause be, and is hereby AFFIRMED.

Filed and entered February 19, 2002
Amended April 10, 2002
Costs taxed.